STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0207
A19-0209

In the Matter of the Denial of a Contested Case Hearing Request and Modification of a Notice of Coverage Under Individual National Pollution Discharge Elimination System Feedlot Permit No. MN0067652, for the Proposed Expansion of Daley Farms of Lewiston LLP, Daley Farms of Lewiston LLP 1, and Daley Farms of Lewiston LLP 7 Section 16, Utica Township (A19-0207),
and
In the Matter of the Decision on the Need for an Environmental Impact Statement for the Proposed Daley Farms of Lewiston, LLP - 2018 Dairy Expansion Utica Township, Winona County, Minnesota (A19-0209).

Filed October 14, 2019
Reversed and remanded
Bratvold, Judge

Minnesota Pollution Control Agency

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Considered and decided by Jesson, Presiding Judge; Worke, Judge; and Bratvold, Judge.

U N P U B L I S H E D O P I N I O N

BRATVOLD, Judge

In this certiorari appeal, relator Minnesota Center for Environmental Advocacy (MCEA) challenges decisions by respondent Minnesota Pollution Control Agency (MPCA), denying MCEA's request for a contested-case hearing on a national pollutant discharge elimination system (NPDES) feedlot permit and request for an environmental impact statement (EIS) regarding respondent Daley Farms' proposed expansion of its dairy-farm concentrated animal feeding operation (CAFO).[1]

The MCEA argues that because Daley Farms' manure management plan (MMP) and best management practices (BMPs) will not effectively mitigate potential environmental effects, Daley Farms' expansion project will pollute the water supply in the sensitive karst area of southeastern Minnesota.[2] Specifically, the MCEA argues that (1) the MPCA's decision to deny an EIS for Daley Farms' expansion was based on an error of law, unsupported by substantial evidence, and arbitrary and capricious; (2) the MPCA's decision to issue a modified NPDES permit was unsupported by substantial evidence;

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[1] An animal feeding operation (AFO) is "a lot or facility (other than an aquatic animal production facility)" where "animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for 45 days or more in any 12–month period" and "[c]rops, vegetation, forage growth or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility." 40 C.F.R. § 122.23 (b)(1) (2019). An AFO is defined as either a large or a medium CAFO. *Id.*, (b)(2) (2019). A dairy operation is a large CAFO if it stables or confines more than "700 mature dairy cows." *Id.*, (b)(4)(i) (2019).

[2] Karst is "[a]n area of irregular limestone in which erosion has produced fissures, sinkholes, underground streams, and caverns." *The American Heritage Dictionary of the English Language* 957 (5th ed. 2011).

(3) the MPCA's denial of a contested-case hearing was unsupported by substantial evidence; and (4) the MPCA's decision to issue the NPDES permit before issuing a commissioner report, as set out in Minn. R. 7001.0125, subp. 2 (2017), was made upon unlawful procedure.

Because the MPCA's determination that an EIS was not needed was arbitrary and capricious, we reverse and remand to the MPCA for further proceedings consistent with this opinion. And because a determination of whether an EIS is needed must precede a decision to approve a permit modification, we also reverse the NPDES permit modification approval and remand to the MPCA. We reject other objections raised by the MCEA, however, and also conclude the MPCA's denial of a contested-case hearing is supported by substantial evidence, and the MPCA's failure to issue a commissioner's report was not procedural error.

FACTS

Daley Farms is a Minnesota limited liability partnership consisting of members of the Daley Family.[3] Daley Farms owns and operates three dairy sites in Winona County. The MPCA is the responsible governmental unit (RGU) charged with conducting environmental review of any major governmental action under the Minnesota Environmental Protection Act (MEPA), Minn. Stat. §§ 116D.01-.11 (2018), and is the permitting authority for animal-feedlot permits under Minn. R. 4410.4300, subp. 29 (2017).

[3] In briefing, respondent Daley Farms refers to itself as Daley Farm. Consistent with the record, we refer to the Daley respondents as Daley Farms.

In July 2017, Daley Farms sought to expand its dairy operation, and applied to the MPCA for "major modification" to its NPDES feedlot permit.[4] An NPDES permit limits the type and quantity of pollution that can be released into waters of the United States and includes conditions to ensure compliance with state water-quality standards. 40 C.F.R. § 122.44 (2019); *see also* Minn. R. 7001.1000-.1150 (2017).

The proposed project would increase Daley Farms' dairy-cow count from 1,728 to 4,628 animals (2,275.2 AU to 5,967.7 AU).[5] The project would also add a rotary parlor, an earthen-berm-liquid-manure-storage area, and a feed-storage area. Because of the size of the proposed project, the MPCA was required, by rule, to conduct an environmental review and complete an environmental assessment worksheet (EAW). *See* Minn. R. 4410.4300, subp. 29(B); *see also* Minn. R. 4410.1000, subp. 2 (2017) ("An EAW shall be prepared for any project that meets or exceeds the thresholds of any of the EAW categories listed in part 4410.4300 . . . ."). To complete the EAW, the MPCA began gathering information from its own professionals and from Daley Farms.

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[4] We use the terms "NPDES feedlot permit" and "NPDES permit" interchangeably throughout this opinion as the NPDES permit for Daley Farms is specific to feedlots.

[5] "AU" refers to animal unit. The parties do not discuss whether the applicable definition of AU is in Minn. Stat. § 116.06, subd. 4a (2018). But it appears that the MPCA and Daley Farms used this statutory definition to calculate the AUs. Section 116.06, subdivision 4a, defines AU as a "unit of measure used to compare differences in the production of animal manure that employs as a standard the amount of manure produced on a regular basis by a slaughter steer or heifer for an animal feedlot or manure storage area." Minn. Stat. § 116.06, subd. 4a. The AU is "calculated by multiplying the number of animals in [the statutory provisions] by the respective multiplication factor and summing the resulting values for the total number of animal units." *Id.* The multiplication for a mature dairy cow over 1,000 pounds is 1.4 AUs, and for a mature dairy cow under 1,000 pounds is 1.0 AUs. *Id.*, subd. 4a(1).

The EAW described the proposed project and stated that Daley Farms would construct two new on-site wells, adding to two existing water wells at the project site, and increase Daley Farms' annual water use to 92 million gallons of water. Since the additional cows would produce about 46.2 million gallons of manure annually, and because the project included the addition and construction of a large manure-storage basin, the EAW also summarized Daley Farms' MMP which included moving manure from storage basins and applying it to land nearby. Because Daley Farms submitted the MMP with its feedlot-permit application, the MMP would become an enforceable condition of the permit if the MPCA approved the proposed expansion.

The EAW also stated that "the southeastern part of Minnesota has karst geology and therefore contains sinkholes, caves, springs, and other karst features," but added that "[n]o karst features were located at the existing or proposed feedlot or manure-basin sites" at Daley Farms. Attached to the EAW were maps identifying known karst features in the area, including sinkholes. One manure-application site contains a mapped sinkhole, but the EAW stated that any concern could be mitigated in two ways: first, the new animal feedlot or manure-storage area would be "more than 300 feet from the mapped sinkhole," and, second, as part of its MMP, Daley Farms would follow manure-application practices required by the permit, along with other applicable rules and regulations. The EAW also detailed practices that Daley Farms would follow to reduce the likelihood of nitrates leaching into groundwater.

The MPCA made the EAW draft available for public comment from October 1 to November 15, 2018, and received 615 comments about the NPDES permit and the EAW.

Some comments voiced concerns about the amount of manure the proposed expansion would produce and whether it would impact already-high water-nitrate levels in the area. Comments also emphasized that the MPCA should give special attention to the proposed project because the land would be unable to absorb high-volume amounts of manure.

The MCEA also commented that because of the land's karst features, the large amount of manure produced by the expansion would eventually contaminate the water supply, that the EAW did not account for climate change and greenhouse-gas emissions the expansion would produce, and that a catastrophic failure of the manure-storage basin would cause millions of gallons of raw manure to enter ground and surface water. The MCEA asserted that, given the potential for significant environmental effects, an EIS, which is an exhaustive review prepared by the responsible governmental unit, should be completed before the MPCA approved the expansion. *See* Minn. Stat. § 116D.04, subd. 2a; Minn. R. 4410.2000, subp. 1 (2017) (stating purpose of EIS); Minn. R. 4410.2300 (2017) (providing content of EIS).

The MCEA opposed the NPDES permit, arguing that the proposed permit did not consider discharge to the state's waters from the land application of manure, and therefore the MPCA should deny Daley Farms' NPDES permit application or, alternatively, refer the proposal for a contested-case hearing. The MCEA submitted a report from its expert, Gyles Randall (Dr. Randall), Professor Emeritus in Soil Science at the University of Minnesota Southern Research and Outreach Center. Dr. Randall opined that, because of the land's karst features, the manure-application sites would likely be unable to absorb the

manure and therefore manure application may lead to ground and surface-water contamination.

In response to comments stating concerns about the land application of the manure, Daley Farms worked with the MPCA to incorporate additional BMPs into its MMP to reduce the risk of nitrate infiltration. Like the MMP, the BMPs would become enforceable conditions of the permit if approved by the MPCA. The BMPs allowed Daley Farms to choose at least two of seven specific practices to reduce the potential for nitrate loss to ground and surface water and agricultural-stormwater damage.

After the comment period ended, the MPCA issued findings of fact, conclusions of law, and two orders on Daley Farms' proposed expansion. In the first order on the need for an EIS, the MPCA found that Daley Farms would operate under the MMP to mitigate nitrate loss to ground and surface water and that the MMP contained more safeguards than required by the NPDES-feedlot-permit regulations. The order included information about the project's effects on air quality, karst geology concerns, and ground and surface-water quality. The order also provided that the MPCA had reviewed data in the EAW, the feedlot-permit application, and various reports and test results. But the order did not discuss the effect of greenhouse-gas emissions produced by the proposed expansion. Nonetheless, the MPCA determined an EIS was not needed because the project design and permits ensure that Daley Farms "will take appropriate mitigation measures to address [potentially] significant [environmental] effects," and because the MPCA expects the project to comply with applicable "environmental rules, regulations, and standards."

In response to the NPDES feedlot permit application and the MCEA's request for a contested-case hearing, the MPCA issued a second order, in which it reviewed each of the MCEA's reasons for requesting a contested-case hearing and provided responses. The MPCA concluded that the MCEA raised questions of law and did not raise material issues of fact, as is required to grant a contested-case hearing. Therefore, the MPCA denied the MCEA's request for a contested-case hearing and granted Daley Farms' request to modify its NPDES feedlot permit.

On the same day that the MPCA issued its orders denying an EIS for Daley Farms' expansion and granting Daley Farms' modification permit, the MPCA commissioner requested that the Minnesota Environmental Quality Board (EQB) order a generic environmental impact statement (generic EIS) under Minn. R. 4410.3800, subp. 3 (2017), "to study and address nitrate pollution of groundwater in the geologically sensitive karst region of southeastern Minnesota."

This appeal follows.

D E C I S I O N

We review the MPCA's orders under the Minnesota Administrative Procedure Act (MAPA) to determine whether the substantial rights of relators "may have been prejudiced because the administrative finding, inferences, conclusion, or decisions" are "(a) in violation of constitutional provisions, (b) in excess of the statutory authority or jurisdiction of the agency, (c) made upon unlawful procedure, (d) affected by other error of law, (e) unsupported by substantial evidence in view of the entire record as submitted, or (f) arbitrary or capricious." Minn. Stat. § 14.69 (2018); *see also* Minn. Stat. § 116D.04,

subd. 10 (2018) (providing review of EIS decisions under MAPA); Minn. Stat. § 115.05, subd. 11(1), (4) (2018) (providing review of final decisions pertaining to permits, and requests for contested-case hearings under MAPA).

We "accord substantial deference to the agency's decision." *Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006) (*CARD*). We evaluate whether the MPCA took a "hard look" at the problems involved, and whether the agency "genuinely engaged in reasoned decision-making." *Id.* We will defer to an agency's decision unless it reflects an error of law, is arbitrary and capricious, or the findings are unsupported by substantial evidence. *Id.*

Substantial evidence is: "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"; "more than a scintilla of evidence"; "more than some evidence"; "more than any evidence"; and "evidence considered in its entirety." *CARD*, 713 N.W.2d at 832 (quotations omitted). An agency's decision is arbitrary and capricious if the agency: "relied on factors not intended by the legislature"; "entirely failed to consider an important aspect of the problem"; "offered an explanation that is counter to the evidence"; or "the decision is so implausible that it could not be explained as a difference in view or the result of the agency's expertise." *Id.* A relator has the burden of proving that the RGU's findings are unsupported by the evidence as a whole. *Id.* at 833.

I. The MPCA's decision to deny the MCEA's EIS request was arbitrary and capricious because the MPCA failed to consider potentially significant environmental effects of greenhouse-gas emissions.

Environmental review in Minnesota is governed by MEPA, Minn. Stat. §§ 116D.01-.11. Under MEPA, a determination of whether significant environmental

effects will result from a project—and thus an EIS is required—is "primarily factual and necessarily requires application of the agency's technical knowledge and expertise to the facts presented." *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 464 (Minn. 2002) (*MCEA v. MPCA*). "[I]t is appropriate [for courts] to defer to the agency's interpretation of whether the statutory standard is met." *Id.* And we defer to the MPCA's criteria for evaluation and its ultimate determination on "significant environmental effects." *In re Cities of Annandale & Maple Lakes NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 514 (Minn. 2007).

The MCEA argues that the MPCA's decision to deny an EIS was arbitrary and capricious because the MPCA failed to consider the effects of the proposed expansion's greenhouse-gas emissions. The MCEA contends that we must reverse both the EIS order and the NPDES permit approval order because the MPCA "failed to consider an entire category of environmental effects." First, the MCEA argues that the MPCA incorrectly interpreted MEPA and confused the questions on the EAW form with MEPA's requirements. Second, the MCEA argues that, because MEPA requires consideration of the potential for significant environmental effects, the MPCA's analysis should not have been limited to questions on the EAW form.

Our analysis begins by summarizing MEPA generally, and focuses on the environmental rules applicable to the MPCA, and then we address the MCEA's arguments. MEPA requires a government agency making a permitting decision on a proposed project to assess whether the project has the potential for significant environmental effects. *See* Minn. Stat. § 116D.04, subds. 1a(d), 2a. The EQB has promulgated administrative

rules to give effect to MEPA's requirements, and those rules are more specific than MEPA's requirements, which set forth the minimum standards for environmental review. *See* Minn. Stat. § 116D.04, subd. 5a (directing promulgation of rules); Minn. R. 4410.0200-.9910 (2017) (environmental review rules); *see also CARD*, 713 N.W.2d at 823 n.3 (stating that although MEPA's basic framework was codified in section 116D.04, "the legislature directed the EQB to pass more specific rules," and those regulations it formulated are in chapter 4410 of the Minnesota Rules).

MEPA provides for two levels of assessment of environmental effects—an EAW and an EIS. An EAW is a brief document that sets out the facts necessary to determine whether an EIS is required for a proposed project; it contains fewer criteria and is less exhaustive than an EIS. Minn. Stat. § 116D.04, subd. 1a(c); Minn. R. 4410.1000, subp. 1 (purpose of EAW); Minn. R. 4410.2000, subp. 1 (purpose of EIS); *see also Watab Twp. Citizen All. v. Benton Cty. Bd. of Comm'rs*, 728 N.W.2d 82, 89-90 (Minn. App. 2007), *review denied* (Minn. May 15, 2007).

In contrast, the EIS is "an analytical rather than an encyclopedic document that describes the proposed action in detail, analyzes its significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which environmental impacts of an action could be mitigated." Minn. Stat. § 116D.04, subd. 2a(a). The EIS should also analyze "economic, employment, and sociological effects that cannot be avoided should the action be implemented." *Id.* An EIS must be prepared for projects that have the "potential for significant environmental effects." *Id.*; Minn. R. 4410.1700, subp. 1 (2017).

The RGU "shall base its decision regarding the need for an EIS on the information gathered during the EAW process and the comments received on the EAW." *See* Minn. R. 4410.1700, subp. 3. In determining whether a project has the potential for significant environmental effects, the RGU is to compare the criteria in Minn. R. 4410.1700, subp. 7, with the "impacts that may be reasonably expected to occur from the project." *See* Minn. R. 4410.1700, subp. 6. Whether an EIS is needed is ultimately left to the RGU. Minn. R. 4410.1700, subp. 3 ("The RGU's decision shall be either a negative declaration or a positive declaration.").

MEPA instructs the EQB to establish the form and content of EAWs. *See* Minn. Stat. § 116D.04, subd. 5a(2). To do so, the EQB has adopted regulations that require the chair of the board to develop and periodically assess EAWs to ensure they provide complete, accurate, and relevant information for a particular project. *See* Minn. R. 4410.1300. The "EQB chair may approve the use of an alternative EAW form if an RGU demonstrates the alternative form will better accommodate the RGU's function or better address a particular type of project and the alternative form will provide more complete, more accurate, or more relevant information." *Id.*

Here, the RGU is the MPCA and the MPCA used an "Alternative EAW Form for Animal Feedlots," which was approved by the chair of the EQB, to determine whether Daley Farms' expansion project has the potential for significant environmental effects. *See* Minn. R. 4410.1700, subp. 1. This alternative EAW form does not refer to greenhouse-gas emissions.

With this background in mind, we address the MCEA's two arguments. First, the MCEA argues the MPCA's decision to deny an EIS was legally erroneous because "greenhouse gas emissions are a significant environmental effect that must be evaluated as part of any project's environmental review." The MCEA argues that MPCA guidance, caselaw, and applicable rules require evaluation of greenhouse-gas emissions. In support, the MCEA cites an MPCA guidance document titled, *Discussing Greenhouse Gas Emissions in Environmental Review*, and our unpublished decision in *Minn. Ctr. for Envtl. Advocacy v. Holsten*, No. A08-2171, 2009 WL 2998037, at *3 (Minn. App. Sept. 22, 2009).[6]

Neither the MPCA guidance document nor our unpublished decision *require* the MPCA specifically to evaluate greenhouse-gas emissions. The MPCA document is not directly applicable here—it only applies if a project requires an EAW or EIS, *as well an air-emissions permit*. *See* Thaddeus R. Lightfoot, *Climate Change and Environmental Review: Addressing the Impact of Greenhouse Gas Emissions under the Minnesota Environmental Policy Act*, 36 Wm. Mitchell L. Rev. 1068, 1099 (2010). Daley Farms' project does not require an air-emissions permit.

[6] In passing, the MPCA argues that the guidance document should be stricken because it was not part of the administrative record. But we may take judicial notice of or otherwise refer to public documents not included in the record on appeal. *See State v. Rewitzer*, 617 N.W.2d 407, 411 (Minn. 2011) (denying motion to strike documents that were matters of public record and stating that court was therefore free to refer to them in the course of its own research). Here, the document that MCEA included in its addendum is publicly available on the MPCA's website and we may therefore refer to and consider it.

Moreover, the MCEA's reliance on our unpublished decision is misplaced because our unpublished decisions are not precedential. *Dynamic Air, Inc., v. Bloch*, 502 N.W.2d 796, 800-01 (Minn. App. 1993); *see Vlahos v. R&I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004) (stating that the district court erred "both as a matter of law and as a matter of practice" by relying on an unpublished opinion and "stress[ing] that unpublished opinions of the court of appeals are not precedential" and noting both that "[t]he danger of miscitation [of unpublished opinions] is great because unpublished opinions rarely contain a full recitation of the facts").[7]

Second, the MCEA argues that the MPCA's "refusal to evaluate known environmental impacts is arbitrary and capricious" because the MPCA was "well aware of the significant effects posed by greenhouse gasses." As discussed above, in completing its environmental review of Daley Farms' project, the MPCA used an "Alternative EAW Form for Animal Feedlots," which does not require a project proposer to provide information concerning air emissions or greenhouse gasses.

But the MCEA and others who commented on the draft permit raised concerns about the project's potential for significant environmental effects, including greenhouse-gas emissions. In its comments, the MCEA asserted that the EAW contains "no analysis of

[7] Even if we consider our unpublished decision in *Holsten*, the opinion is not directly applicable here. In *Holsten*, the MCEA argued on appeal that the "EIS failed to address the environmental impact of the project's greenhouse-gas emissions, climate change, and the generation of electrical power for the project." *Holsten*, 2009 WL 2998037, at *1. We declined to decide whether an EIS required consideration of greenhouse-gas emissions. *See id.* at *3 n.5. Instead, we reasoned that the DNR "clearly considered the impact of the project's greenhouse gas emissions" and the EIS "acknowledge[d] that the project would contribute CO_2 emissions to the atmosphere." *Id.* at *3.

greenhouse gas emissions whatsoever." The MPCA responded to the MCEA's comment by stating that it did not consider greenhouse-gas emissions because "[t]he [f]eedlot EAW form does not currently require evaluation of greenhouse gasses."

On appeal, the MCEA contends that the EAW fails to account for the project's contributions to climate change, even though, according the MCEA's calculations, the proposed expansion would emit 1,217,247.1 kg of methane per year, making Daley Farms the 43rd-largest greenhouse-gas emitter in the state. In response, the MPCA contends that it was not required to consider greenhouse-gas emissions because "Daley Farms does not require an air emissions permit."

We agree with the MCEA that the MPCA's analysis was not limited to the EAW form. Rather, the MPCA is to evaluate whether the project has the "potential for significant environmental effects," Minn. Stat. § 116D.04, subd. 2a(a), and an EIS "shall be ordered for projects that have the potential for significant environmental effects." Minn. R. 4410.1700, subp. 1. In determining whether a project has the potential for significant environmental effects, the MPCA is to consider all information gathered during the environmental review, including comments received on the EAW. Minn. R. 4410.1700, subp. 3. Because the MCEA raised the issue of greenhouse-gas emissions during the comment period, the MPCA should have considered this potentially significant environmental effect. *See* Minn. R. 4410.1700, subp. 4.

The MPCA's response to the MCEA's comment suggests that it did not consider greenhouse-gas emissions before it denied an EIS. Not only are greenhouse-gas emissions absent from the animal-feedlot EAW form, but they are also missing from the EIS order

issued by the MPCA after the public-comment period. The MPCA does not dispute that large dairy-farm operations like Daley Farms emit methane, a greenhouse gas that contributes to climate change, and that greenhouse-gas emissions could have the potential for significant environmental effects.[8] The MPCA's reliance on the absence of greenhouse-gas emissions on the animal-feedlot EAW form shows that the MPCA failed to take a "hard look" because it "entirely failed to consider an important aspect of the problem." *See CARD*, 713 N.W.2d at 832.

Moreover, the MPCA stated at oral argument that it is considering changing its environmental review for animal feedlots and specifically contemplating whether greenhouse-gas emissions should be included. As the MPCA pointed out, it has discretion to determine which environmental factors to consider in reviewing permits, and should it determine that greenhouse gasses must be considered in the environmental-review process for NPDES feedlot permits, the MPCA has the authority to amend Daley Farms' permit to ensure environmental protection. These statements imply that the MPCA was aware of, but failed to consider the potential effects of the greenhouse-gas emissions. Certainly, the MCEA points out in briefing, the legislature appears to have "understood that greenhouse

[8] We note that the MPCA routinely considers greenhouse-gas emissions in its EAWs. In fact, the standard EAW form requires information on the "type, sources, quantities, and compositions of any emissions from stationary sources of air emissions such as boilers, exhaust stacks or fugitive dust sources"; it also requires information on "any hazardous air pollutants" and "*any greenhouse gases* (such as carbon dioxide, methane, nitrous oxide)." *See* Minn. Envtl. Quality Bd., *Environmental Assessment Worksheet* 6 (2008), https://www.eqb.state.mn.us/sites/default/files/documents/EAW%20August2008Revision2-forpdf.pdf (emphasis added).

gas emissions pose a threat to the public's safety, health, and welfare," by creating a statewide goal to reduce greenhouse-gas emissions. Since 2007, Minnesota law has provided that it "is the goal of the state to reduce statewide greenhouse gas emissions across all sectors producing those emissions." Minn. Stat. § 216H.02, subd. 1 (2018). The statute requires, by February 1, 2008, that "the commissioner of commerce, in consultation with the commissioners of the Pollution Control Agency . . . submit to the legislature a climate change action plan." *Id.*, subd. 2 (2018).

We acknowledge Daley Farms' assertion that there is no easy measure for determining the environmental impact from a feedlot permit because of the substantial difficulty and uncertainty in estimating emissions from animal feedlots. *See* Lightfoot, *supra*, at 1094 (pointing out that our decision in *Holsten* "recognizes that certain analyses relevant to climate change, such as determining the impacts of a project's discrete greenhouse gas emissions or how changes in the climate may affect models used to forecast a project's environmental effects, are beyond the state of the art"). But although it may be difficult to measure the impact of greenhouse-gas emissions, the MPCA did not offer this as an explanation when it denied the EIS for Daley Farms' project because it did not consider the issue.

We conclude that the MPCA failed to take a "hard look" at potentially significant environmental effects and its decision lacks "articulated standards and reflective findings." *See Berne Area All. for Quality Living v. Dodge Cty. Bd. of Comm'rs*, 694 N.W.2d 577, 580 (Minn. App. 2005), *review denied* (Minn. June 28, 2005); *see also CARD*, 713 N.W.2d at 832. Therefore, we reverse and remand the EIS order for further proceedings consistent

with this opinion. In addition, because a determination of whether an EIS is needed should have preceded the MPCA's permit approval of Daley Farms' project, we also reverse and remand the MPCA's approval of Daley Farms' request to modify its NPDES permit.

II. The MPCA's decision to reject other objections to Daley Farms' project is supported by substantial evidence and not arbitrary and capricious.

We conclude that the MPCA's decision to reject the MCEA's other objections to Daley Farms' project is supported by substantial evidence. We address each objection in turn.

A. The MPCA's request to the EQB for a generic EIS

The MCEA argues that the MPCA's denial of an EIS was arbitrary and capricious because the MPCA simultaneously requested a generic EIS to study nitrate pollution in the groundwater in the karst region of southeastern Minnesota. The MCEA argues that the generic EIS request means that the MPCA recognizes that "additional investigation" is necessary before the environmental effects of Daley Farms' expansion project can be understood.

MEPA provides for two types of environmental review: project-specific review, where an RGU determines whether a particular project could cause significant environmental effects; and generic review, which examines concerns not adequately reviewed on a case-by-case basis. *CARD*, 713 N.W.2d at 823. A generic EIS may be ordered by the EQB to study a concern that cannot be adequately reviewed on a case-by-case basis. Minn. R. 4410.3800, subp. 1 (2017). "A generic EIS is an EIS ordered not because there is a specific project under consideration, but because the EQB has

a particular broad environmental concern unrelated to a specific project." *CARD*, 713 N.W.2d at 826. "[A] generic EIS is intended to go further and review more than a project-specific EIS." *Id.*

In generic environmental review, the EQB is the default RGU; an EAW is not completed or used in determining whether a generic EIS is required. *Id.* at 824; *see generally* Minn. R. 4410.3800, subps. 3, 5-6. The generic EIS criteria "are quite different than those used for project-specific EIS determinations." *CARD*, 713 N.W.2d at 826. In determining whether to grant a request for a generic EIS, the EQB is to consider the criteria in Minn. R. 4410.3800, subp. 5, which includes "the need to understand the long-term past, present, and future effects of a type of action upon the economy, environment, and way of life of the residents of the state" and the "need to explore issues raised by a type of project that go beyond the scope of review of individual projects." "Preparation of a generic EIS does not exempt specific activities from project-specific environmental review" and "[t]he fact that a generic EIS is being prepared shall not preclude the undertaking and completion of a specific project whose impacts are considered in the generic EIS." Minn. R. 4410.3800, subps. 8, 9.

We conclude that the MPCA's decision to request a generic EIS was separate from and not inconsistent with its decision on the need for an EIS for Daley Farms' project. The MPCA requested the generic EIS to "study and address nitrate pollution of groundwater in the geologically sensitive karst region of southeastern Minnesota" because a generic EIS could "help Minnesota citizens, businesses, and decision-makers better understand the

nature, extent and sources of the nitrate contamination." The MPCA further explained that a generic EIS would "provide insight into the actions needed to address the existing contamination that is the cumulative effect of current practices and activities, as well as inform the review of new projects."

The MCEA asserts that our decision in *Pope County Mothers v. Minn. Pollution Control Agency* supports its position. 594 N.W.2d 233, 235-39 (Minn. App. 1999). In *Pope County Mothers*, the MPCA issued feedlot permits to three feeder-pig-finishing sites, which were part of a larger project, before it had completed its environmental review of the cumulative environmental effects of the entire project. *Id.* at 236-37. Despite the MPCA's acknowledgement that the project had the potential for detrimental effects and that more information could be "reasonably obtained," the MPCA did not rescind or act on the permits it had already issued. *Id.* at 237-38. We held that the MPCA's decision to deny an EIS was arbitrary and capricious. *Id.* at 239.

Unlike in *Pope County Mothers*, Daley Farms' expansion project is not part of a connected and phased action. Also, the MPCA evaluated the cumulative impact of Daley Farms' project under Minn. R. 4410.1700, subp. 7, and found that the "EAW, public comments, and MPCA follow-up evaluation did not disclose any related or anticipated future projects that may interact with this Project in such a way as to result in significant cumulative potential environmental effects."

Thus, the MPCA's decision to request a generic EIS on nitrate pollution is for a different purpose than its decision on an EIS for Daley Farms' project. The MCEA's

concern about nitrate groundwater pollution has substantial support, but the administrative record establishes that the source of this pollution is unclear. The MPCA considered the issue and determined that the "issue of nitrate contamination is bigger than any one project or site" and "merits a generic EIS" to "better understand the nature, extent and sources of the nitrate contamination." In other words, unlike the feeder-pig finishing sites in *Pope County Mothers*, no more information could be "reasonably obtained" for Daley Farms' project. Thus, we conclude that the MPCA's decision to request a generic EIS to study nitrate pollution does not mean it acted arbitrarily and capriciously.

B. Mitigation measures

The MCEA contends that the MPCA had "overwhelming evidence that heavy application of manure in karst regions has clear potential for significant environmental effects." Therefore, the MCEA argues that "MPCA's reliance on unverified and uncertain 'mitigations' to avoid preparation of an EIS was in error."

"The extent to which environmental effects are subject to mitigation is an important consideration when determining whether a project has the potential for significant environmental effects." *Pope County Mothers*, 594 N.W.2d at 238. When considering whether to require an EIS, the MPCA "must consider the type, extent, and reversibility of environmental effects, and the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority." *Trout Unlimited v. Minn. Dep't of Agric.*, 528 N.W.2d 903, 908 (Minn. App. 1995) (quotation omitted), *review denied* (Minn. Apr. 27, 1995). Mitigation "includes avoiding or limiting the size of a project, repairing or

restoring the environment, working to preserve or maintain the environment during the life of the project, or replacing or substituting resources." *Id.* (citing Minn. R. 4410.0200, subp. 51 (1993)).

"When an RGU considers mitigation measures as offsetting the potential for significant environmental effects under Minn. R. 4410.1700, it may reasonably do so only if those measures are specific, targeted, and are certain to be able to mitigate the environmental effects." *Friends of Twin Lakes v. City of Roseville*, 764 N.W.2d 378, 383 (Minn. App. 2009). The mitigation measures an RGU may "consider include current regulations, and an RGU may also consider whether mitigation measures may be applied by a regulatory authority." *CARD*, 713 N.W.2d at 834. The RGU must consider what problems may arise "and how they may specifically be addressed by ongoing regulatory authority." *Id.* at 835. But an RGU may not rest its EIS determination on mitigation that amounts only to "vague statements of good intentions." *Id.* at 834.

The MCEA argues that because "the measures relied upon by MPCA to mitigate Daley Farms' significant environmental effects were not created or even evaluated by MPCA's technical staff, MPCA's assertions that these conditions will effectively mitigate pollution" are "vague statements of good intentions." The MCEA also argues that the record lacks evidence to establish that the specific mitigations identified by Daley Farms will reduce nitrate pollution from the expansion project.

The MPCA appears to have relied on existing regulatory authority in determining that the environmental effects of Daley Farms' project are subject to mitigation. In its order, the MPCA noted that the feedlot permit "incorporates construction and operation

requirements, and includes operating plans that address manure management, emergency response protocols, stormwater, and odor/air quality management," and that those are enforceable conditions of the permit. Finally, the MPCA found that Daley Farms' permit includes "general and specific requirements for mitigation of environmental effects."

The MPCA's reliance on the existing regulations was proper because the regulations provide specific measures that Daley Farms must take to mitigate the potential for significant environmental effects. Because the permit's requirements and conditions must be implemented according to the applicable regulations, the MPCA's reliance on the regulatory authority is more than "vague statements of good intentions." *Id.* at 834. Under Minn. R. 7020.2225, subp. 1(A) (2017), Daley Farms must not apply manure or process wastewater in a manner that will result in discharge to waters of the state or "cause pollution of waters of the state due to manure-contaminated runoff." The rule also applies to land not owned or leased by the owner of the animal feedlot generating the manure, so the fields receiving Daley Farms' manure must also comply with the restriction under Minn. R. 7020.2225, subp. 4(E) (2017). Because the regulations provide adequate mitigation measures, the MPCA's reliance on the current regulations to mitigate potential impacts was proper. *Cf. Trout Unlimited*, 528 N.W.2d at 909 (concluding that reliance on *future* regulatory efforts in lieu of conducting an environmental assessment constituted error because it would undermine the "very purpose" of an EIS).

Moreover, in addition to compliance with the regulatory authority, Daley Farms has committed to using BMPs to further reduce the potential for pollution from land application

and storage of manure. The BMPs, created in addition to the MMP, are to further mitigate impacts from nitrate loss to ground and surface water and agricultural-stormwater discharge. Under the BMPs, Daley Farms can choose two or more of the seven practices to further ensure manure will not pollute ground or surface waters. Because of the varying soil conditions, Daley Farms may select which of the BMPs to employ. The BMPs appear to have been created because the MPCA recognized the environmental effects liquid manure could have, and then assessed potential measures to mitigate those concerns.

Overall, the MPCA cited significant information and research on the ability of mitigation measures to offset potential environmental effects of Daley Farms' project. We conclude that the MPCA's determination that mitigation would be sufficient was based on substantial evidence.

III. The MPCA's decision to deny the MCEA's request for a contested-case hearing is supported by substantial evidence.

The MCEA argues that the expert report it included with its request for a contested-case hearing established a genuine issue of material fact and that the MPCA therefore erred by denying its request for a contested-case hearing.

In addition to submitting comments, an interested person may submit a petition for a contested-case hearing during the open-comment period. Minn. R. 7001.0110, subp. 1 (2017). A petition for a contested-case hearing shall include "(1) a statement of reasons or proposed findings supporting a board or commissioner decision to hold a contested case hearing"; and "(2) a statement of the issues proposed to be addressed by a contested case

hearing and the specific relief requested or resolution of the matter." Minn. R. 7000.1800, subp. 2(A) (2017).

Under Minn. R. 7000.1900, subp. 1 (2017), the board or commissioner must grant the petition to hold a contested-case hearing, or upon its own motion, order that a contested-case hearing be held if it finds that "there is a material issue of fact in dispute concerning the matter pending before the board or commissioner"; "the board or commissioner has the jurisdiction to make a determination on the disputed issue of fact"; and "there is a reasonable basis underlying the disputed material issue of fact or facts such that the holding of a contested case hearing would allow the introduction of information that would aid the board or commissioner in resolving the disputed facts in making a final decision on the matter."

The party requesting a contested-case hearing bears the burden of demonstrating that there is a material fact that would aid the agency's decision making. *In re City of Owatonna's NPDES/SDS Proposed Permit Reissuance for Discharge of Treated Wastewater*, 672 N.W.2d 921, 929 (Minn. App. 2004). "And there must be some showing that evidence can be produced that is contrary to the action proposed by the agency." *Id.* The MPCA has discretion to determine whether the permit challenger has met its burden to show that a contested-case hearing is warranted. *See In re N. States Power Co. v. Wilmarth Indust. Solid Waste Incinerator Ash Storage Facility*, 459 N.W.2d 922, 923 (Minn. 1990).

The MCEA first argues that its petition for a contested-case hearing should have been granted because the expert report it submitted with the petition established a "dispute

of material fact" as to whether Daley Farms was using the correct nitrogen-application rate. In its petition, the MCEA argued that the permit would allow the application of liquid manure to croplands in excess of the agricultural utilization of nutrients and that the expansion project relied on an MMP that identified unsuitable land for spreading manure due to setbacks, soil depth, and soil characteristics.

Contrary to the MCEA's argument, Daley Farms used the applicable nitrogen-application-rate standards. *See* Minn. R. 7020.2225, subp. 3 (2017). Under the rule, manure and process wastewater application rates must be limited "so that the estimated plant-available nitrogen from all nitrogen sources does not exceed expected crop nitrogen needs for nonlegume crops and expected nitrogen removal for legumes." *Id.*, subp. 3(A). Expected crop nitrogen needs, removal rates, and estimated nitrogen-application rates must be based on the most-recent published recommendations from the University of Minnesota Extension Service or another land-grant college in a contiguous state. *Id.* Nitrogen sources include commercial-fertilizer nitrogen and manure applied during current and previous years. *Id.*

The MCEA also argues that the MPCA should have relied on information included in Dr. Randall's report, where he opined that the proper nitrogen-application rate should be 159 pounds/acre on corn fields if the prior year's crop also was corn, and 123 pounds/acre if the prior year's crop was soybeans. Dr. Randall recommended that, based on his calculation using the "maximum return to nitrogen," the MPCA's calculation on the "N" price/crop ratio within the "Corn N Rate Calculator" should have been 0.10.

But the MPCA determined that Dr. Randall's recommendations were not appropriate. The MPCA explained that Dr. Randall's recommendations would be accurate if Daley Farms was using a *commercial* fertilizer, but because Daley Farms is using manure as a fertilizer, the "N" price/crop ratio most applicable to manure nutrients is 0.05 not 0.10. The MPCA's determination is consistent with the requirements under Minn. R. 7020.2225, subp. 1, based upon nitrogen-application rates recommended by the University of Minnesota Extension Service. Using that guidance, and the applicable ratios, the MPCA determined that the proper nitrogen-application rate is 180 pounds/acre for corn following corn and 140 pounds/acre for corn following soybeans, which is consistent with Daley Farms' MMP.

Relying on *City of Owatonna*, the MCEA further argues that the differences between the nitrogen-application rates create a genuine issue of material fact. *See* 672 N.W.2d at 928. But in *City of Owatonna*, relator's expert not only raised material issues of fact, but also demonstrated that the wastewater-treatment facilities had a detrimental effect on the lake water, and contradicted the action proposed by the agency. *Id.* at 929. Here, even if Dr. Randall's report raises a genuine issue of material fact, the MCEA appears to be challenging the MPCA's findings and methodologies without showing how a contested-case hearing would aid the MPCA in determining the nitrogen-application rates.

In its order, the MPCA addressed the MCEA's concern about the nitrogen-application rate, but determined that a contested-case hearing was not warranted because the MCEA was challenging the validity of a regulation, which is a question of law and not a genuine issue of material fact. We agree. Because the MCEA is raising a legal

argument by challenging the regulation, and is not challenging Daley Farms' compliance with the regulation, the MPCA properly denied the MCEA's request for a contested-case hearing.

IV. The MPCA's failure to issue a commissioner report was not procedural error.

Finally, the MCEA argues that the MPCA failed to comply with the report rule requirement in Minn. R. 7001.0125, subp. 2, because it did not issue a commissioner report ten days before making a final decision on the permit.[9] Both Daley Farms and the MPCA argue that this provision is inapplicable because the rule's plain language and its regulatory history demonstrate that the rule was intended to provide a now-disbanded citizens' board with information necessary for its decision-making. Because the commissioner is now the final decision-maker, the MPCA contends that the ten-day requirement is irrelevant.

We interpret regulations as we interpret statutes. *See J.D. Donovan, Inc. v. Minn. Dep't of Transp.*, 878 N.W.2d 1, 5 (Minn. 2016); *see also CARD*, 713 N.W.2d at 828 n.9. And here, because the rule is not ambiguous, we construe the rule at issue "according to the common and approved usage of its words and phrases and do not disregard the rule's

[9] The report is to address several criteria, including "whether the agency has received any requests for a public informational meeting and whether those requests meet the requirements of part 7000.0650, subpart 4," and "state whether the agency has received any petitions for a contested case hearing and whether those petitions meet the requirements of parts 7000.0110 and 7000.1800." Minn. R. 7001.0125, subp. 2. In addition, the report shall "recommend changes to the proposed permit or other actions that the commissioner believes are reasonable in response to comments submitted during the comment period" and "recommend whether a contested case hearing should be held and, if so, the issues and scope of the hearing." *Id.*

plain meaning to pursue its spirit." *Troyer v. Vertlu Mgmt. Co./Kok & Lundberg Funeral Homes*, 806 N.W.2d 17, 24 (Minn. 2011).

Minn. R. 7001.0125, subp. 2, provides that "[u]nless the agency has held a contested case hearing on the matter, the commissioner shall prepare a report and shall serve that report upon all agency members and interested persons *at least ten days before a meeting* at which the agency is scheduled to take final action on the issuance, revocation, or modification of a permit." (Emphasis added.) We acknowledge the MPCA's argument that "[w]hen Minn. R. 7001.0125 was enacted, MPCA had a decisional body, called the Citizens' Board, which had multiple members and held meetings." But we do not further address the rule's history or its purpose, because the MCEA does not identify what "meeting" should have triggered a report in this case. Without a meeting to trigger the report requirement, we cannot agree with the MCEA that the rule was violated.

Even if we read Minn. R. 7001.0125 to require the commissioner to prepare and file a report ten days before making a final decision, the MCEA cannot articulate how the MPCA's decision was affected. The MCEA appears to assert that if the MPCA had filed a report, the MPCA should have allowed public comment on the report. We disagree, first, because the rule's plain language does not provide for public comment on the report. *See* Minn. R. 7001.0125. Second, the current regulatory scheme gives the opportunity for public participation and comment in Minn. R. 7001.0110, subp. 3 (public informational meeting during public-comment period), and Minn. R. 7001.0120 (if commissioner or agency determines that a public informational meeting "would help clarify and resolve

issues regarding the commissioner's preliminary determination or the terms of the draft permit," commissioner shall hold a public informational meeting).

Because the MPCA complied with the applicable public-comment rules and the MCEA cannot identify the meeting that purportedly triggered the ten-day report requirement, the MPCA's failure to issue a report was not procedural error.

Reversed and remanded.